



January 2006

Keller and Heckman LLP
Serving Business through Law and Science®

Recent Proposed Rule by the U.S. Chemical Safety and Hazard Investigation Board Requires Companies to Preserve Evidence Related to Chemical Accidents

The U.S. Chemical Safety and Hazard Investigation Board (CSB) recently published a proposed rule that would impose a requirement on companies to preserve evidence related to significant chemical accidents that the CSB elects to investigate. The CSB is an independent federal agency that investigates industrial chemical accidents, and makes safety recommendations to plants, industry organizations, labor groups, and regulatory agencies such as the Occupational Safety and Health Administration (OSHA) and the Environmental Protection Agency (EPA). The proposed rules represent an effort by CSB to provide for the preservation of evidence following accidental releases of hazardous substances.

Content and Scope of the Proposed Rule

CSB has proposed to authorize its investigators to:

- 1) issue written notices and orders which would require the owner or operator of an accident site to protect chemical and physical evidence as well as documents, records, and electronic data related to “accidental releases” at the workplace; and
- 2) issue a subpoena for any evidence which the investigator believes may be altered or destroyed.

An “Accidental Release” is defined to include unanticipated emissions of a substance regulated as a “hazardous pollutant” under the Clear Air Act¹, or emissions of other hazardous substances from a stationary source that result in a fatality, serious injury, or substantial property damage.

Following an Accidental Release, CSB investigators would issue a “Notice of Accident Investigation Initiation and Order to Preserve” (Notice) to the owner and/or operator of the facility. The Notice would specify that the owner and/or operator is required to protect any relevant evidence which may assist the CSB in determining the cause or causes of the Accidental Release. The proposed regulation specifies that particular attention should be given to preserve the following types of evidence: records; files; papers; electronic records; processes; controls; facilities; and samples of substances, physical objects, or any documents believed to be involved in the accident, or in any way relevant to the accident and/or the CSB investigation. Owners would be required to acknowledge, in writing, receipt of the Notice, and post the Notice in the workplace.

Exceptions

The regulations do provide that an employer may disturb the accident scene for “qualifying emergencies,” which include removing injured persons, extinguishing fires, stabilizing the accident scene, protecting workers or the public from additional releases, or complying with other federal or local laws requiring an immediate response.

Enforcement

Where the owner or operator ignores the subpoena, the regulations would provide for the U.S. Attorney General, acting on behalf of the CSB, to bring a civil action to enforce the subpoena. The proposed rule states that willful or knowing failure to comply with the regulations and/or the express terms of any Notice issued by the CSB would be

¹ See 42 U.S.C. § 7412(b).

referred to the appropriate prosecuting authorities for investigation and possible enforcement under applicable Federal or State law. There is no indication as to what laws might be applicable.

* * * *

CSB is soliciting public comments on this proposed rule. Comments must be received by February 3, 2006.

Significance

This is significant proposal to expand CSB's authority, with potentially disruptive results. CSB is not an enforcement agency, nor does it otherwise support prosecutions of violations of federal law. Such orders would likely disrupt efforts to restore operations after accidents. There are other potential legal issues associated with such authority. If you have questions regarding the scope or content of this proposed rule, or would like assistance in developing comments on the proposed rule, please contact Lawrence P. Halprin at (202) 434-4177 or halprin@khlaw.com, David G. Sarvadi at 202-434-4249 or sarvadi@khlaw.com, Pat Hurd at (202) 434-4188 or hurd@khlaw.com, or Peter de la Cruz at 202-434-4141 or delacruz@khlaw.com.

OPT-OUT: Keller and Heckman LLP provides the *Workplace Alert* as an information tool to businesses. If you prefer not to receive the *Workplace Alert*, please email us at optout@khlaw.com. If you would like to opt out of all Keller and Heckman LLP electronic advisories, please type "Remove All." Please allow 5 business days for your request to be processed. **OPT-IN:** If this was sent to you by a third party and you would like to be included on our mailing list, please email Traci Mott at mott@khlaw.com and provide your name and email address, along with your request.

Keller and Heckman LLP's *Workplace Alert* © 2006. All rights reserved. All articles are on topics of general interest and do not constitute legal advice for particularized facts. Articles may be copied with attribution.